

EXHIBIT A

1

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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 IN RE: ENRON CREDITORS
3 RECOVERY CORP,

4 Plaintiff,

5 v.

07 CV 6597 (AKH)

6 INTERNATIONAL FINANCE CORP,

7 Defendant.

8 -----x

New York, N.Y.

April 16, 2008

3:15 p.m.

11 Before:

12 HON. ALVIN K. HELLERSTEIN,

13 District Judge

14 APPEARANCES

15 KLEE, TUCHIN, BOGDANOFF & STERN LLP

15 Attorneys for Plaintiff Enron

16 BY: DAVID M. STERN

16 BY: DANIEL J. BUSSEL

17 PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

18 Attorneys for Defendant International Finance

18 BY: STEPHEN J. SHIMSHAK

19 BY: DOUGLAS R. DAVIS

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1 (Case called)

2 MR. STERN: Good afternoon, your Honor.

3 David Stern, for appearing on behalf of Enron. With
4 me at counsel table is my colleague Daniel Bussel.

5 MR. SHIMSHAK: Steven Shimshak, for National Australia
6 Bank and Caisse De Depot, Appellees.

7 Also appearing with me is my partner Douglas Davis.

8 And to Mr. Davis' right is my colleague Rebecca Zubaty.

9 Ms. Zubaty is a Paul wise associate. She has passed the bar in
10 New York and her application process is underway, and with the
11 Court's indulgence, I would greatly appreciate if you would
12 allow Ms. Zubaty to sit at counsel table.

13 THE COURT: Of course. Good afternoon. Everybody,
14 please, be seated.

15 So this is the appeal of the trustee.

16 Mr. Stern, I'll hear from you.

17 MR. STERN: Thank you, your Honor.

18 Again, David Stern, appearing on behalf of ENRON
19 Creditors Recovery Corporation, and, actually, we were in the
20 position of a trustee, although, it's a post reorganization
21 debtor in possession effectively.

22 Your Honor, with your indulgence I am just going to
23 begin again with the case pretty much where I started my
24 opening brief.

25 THE COURT: What happened to the fraudulent transfer

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1 account I don't understand it.

2 MR. STERN: Sorry.

3 THE COURT: What happened at fraudulent transfer
4 account? Is it here? Is it not here?

5 MR. STERN: It was dismissed below. The fraudulent
6 transfer claim against the two defendants who are here as
7 appellees Caisse and National Australia bank which is the
8 second count of the complaint was dismissed with prejudice by
9 Bankruptcy Judge Gonzalez pursuant to the 12 (B) (6) motion.

10 THE COURT: Is it part of the appeal?

11 MR. STERN: Yes, your Honor, it is part of the appeal.
12 We are appealing from the order dismissal that Judge Gonzalez
13 entered dismissing the count against these two defendants who
14 are appellees here.

15 THE COURT: OK. Go ahead.

16 MR. STERN: Thank you. Your Honor, the essence of the
17 challenge to Judge Gonzalez's dismissal order was stated really
18 in our opening few pages and to some extent everything since
19 then has been commentary. Which is our position is very simply
20 that the bankruptcy code has a variety of sections that allow
21 for the avoidance of a transfer. The particular one here at
22 issue is Bankruptcy Code Section 548 which is the analog of the
23 Uniform Transfer Fraudulent Act.

24 And there is a section 550 that merits recovery. That
25 section in its terms gives a plaintiff, a trustee, a debtor in

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1 possession an option of suing the initial transferee, a
2 beneficiary of a transfer or a subsequent transferee. Its
3 language is specifically disjunctive and the trustee can sue
4 one or all of those parties under 550 without having to sue any
5 others.

6 We believe that where the Court went wrong below was
7 by looking at Section 550 and saying that because 550 requires
8 that the transfer be avoided the transfer could not be avoided
9 in the absence of the initial transferee. The source of that
10 error, if you will, goes back to a case from the Tenth Circuit,
11 the Slack Horner case.

12 THE COURT: Could you take me through the spec sheet.

13 MR. STERN: Absolutely, your Honor.

14 The statute that prescribes avoidance is Section 548.
15 And if one looks at 558 (A) (1) you can have a variety of
16 reasons why you can avoid a fraudulent transfer. The rationale
17 here is found in 548 (A) (1) (B) that the transfer was for less
18 than a reasonable equivalent value at a time that ENRON was
19 insolvent.

20 That prescribes what transfer is going to be avoided.

21 THE COURT: So it's (A) (1) (B) (2).

22 MR. STERN: Correct. And then there are a series of
23 subsections under (A) (1) (B) (2) that basically translate
24 insolvency into a number of different tests having inadequate
25 capital.

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1 THE COURT: It's not an issue.

2 MR. STERN: No, it's not an issue.

3 THE COURT: Cause you've alleged and that makes it
4 sufficient.

5 MR. STERN: I don't think there is any question that
6 we've sufficiently alleged what needs to be alleged under
7 558(A).

8 THE COURT: Now, go into 550.

9 MR. STERN: 550 tells you in my view who one can sue
10 and 550(A) says except as otherwise provided in this section to
11 the extent that a transfer is avoided under section and then it
12 gives a series of sections including 548, the trustee may
13 recover for the benefit of the estate the property transferred
14 or if the Court so orders the value of such property from,
15 number one, the initial transferee of such transfer or the
16 entity for whose benefit such transfer was made. Then there's
17 a semi colon and the word "or" and then there is sub two, any
18 immediate or immediate transferee of such initial transferee.
19 And in bankruptcy speak immediate or immediate transferee means
20 a subsequent transferee.

21 So, it's our position and we think it's clearly rooted
22 in the language of Section 550, it's rooted in the history and
23 the policy as well, that we as a plaintiff, as a trustee in
24 effect have the ability to sue to recover a fraudulent
25 transfer, to recover a fraudulent transfer and choose from whom

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1 they recover.

2 In terms of the modern history of interpreting Section
3 550 we actually think that both Judge Gonzalez and the system
4 to some extent went astray via the Slack Horner decision out of
5 the Tenth Circuit in 1992.

6 THE COURT: His analysis is mostly statutory and
7 grammatical. The cases is split, not as binding and not as
8 authoritative and Judge Gonzalez is the fashion these days
9 looked at the four corner of the statute, interpreted it and
10 came to a very reasonable view that he came to, and the press
11 of language is on the phrase "to the extent that a transfer is
12 avoided".

13 MR. STERN: Correct.

14 THE COURT: And that gives you the trouble.

15 MR. STERN: Well, I don't think it does, your Honor.
16 I think that what judge Gonzalez did was add to the language of
17 550, because what he said is that one has to sue the initial
18 transferee in order to sue a subsequent transferee. That
19 language that you just pointed to in Section 550 was actually
20 explained in a bunch of the cases. Doesn't have anything to do
21 with suing an initial transferee and indeed is found, not in
22 our appendix but in the appendix file by the Paul Weiss firm,
23 at tab number 3 and it explains what 550(A) means.

24 If I may I'll quote from the legislative history which
25 is found at their tab three. I guess it's page 4-2449 for

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1 future reference. And in the middle of the paragraph --

2 THE COURT: 2249?

3 MR. STERN: 2249 on the bottom it says apt part 4-2449
4 so that's the only reference that I really can refer to.

5 THE COURT: I have it.

6 MR. STERN: The second full paragraph begins with
7 Section 550 (A) (1), of the house amendment has been modified
8 in order to permit recovery from an entity whose benefit an --
9 Section 550 (C) would still apply and the trustee is entitled
10 to only a single satisfaction. And at this point the language
11 becomes interesting. The liability of.

12 THE COURT: One minute, Mr. Stern.

13 MR. STERN: Sure.

14 (Pause)

15 THE COURT: Go ahead.

16 MR. STERN: Again, pointing to that second full
17 paragraph. I guess your Honor has it in front of you and I was
18 just up to the sentence that talks about the liability of a
19 transfer and 550 (A) that says the liability of a transferee
20 under Section 550 (A) applies only "to the extent that a
21 transfer is avoided". This means that liability is not imposed
22 on a transferee to the extent that a transferee is protected
23 under a provision such as a 48 (C) which grants a good faith
24 transferee of value of the transfer that is avoided only as
25 fraudulent transfer, a lien on the property transfer to the

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1 extent of a value given. That's the explanation of that
2 section. What that says I think in plain English is that the
3 liability of a subsequent transferee is never going to be
4 larger than the liability of an initial transferee and indeed
5 it may be less because a subsequent transfer has additional
6 good faith defenses that he can assert under 550 (C).

7 The problem with the opinion below is not that it was
8 literal but that, frankly, it wasn't. Because the literal
9 language of 550 (A) says you can sue (A) or (B) or (C). A
10 being the initial transferee, B being the parties for whose
11 benefit the transfer was made that can be somebody different
12 and C being the subsequent transferee, and, again, applying in
13 a plain language reading to 550 (A), the plaintiff gets his
14 choice.

15 THE COURT: The problem with your argument is that the
16 word "avoided" is used and not "avoidable".

17 MR. STERN: I don't think that is a problem and I know
18 the case law finds that problematic.

19 THE COURT: Well, it is not just the case law.
20 Avoidable and avoided are different words used differently in
21 fraudulent conveyance law.

22 MR. STERN: Yes.

23 THE COURT: And the use of one rather than another has
24 to be given significance.

25 MR. STERN: I believe it can be given significance and

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1 I believe it has significance and let me explain how I think it
2 has significance. Incidentally, specifically, reserve some
3 time for rebuttal. I hope I may have a few minutes.

4 THE COURT: You'll both have time.

5 MR. STERN: Great. Thank you.

6 How does avoided play into it? And again I think we
7 have a very simple plain language resolution that is also
8 consistent with centuries of law which is fundamentally this,
9 as to a subsequent transferee in this case National Australia
10 Bank and Caisse what we would have to prove is that the
11 transfer, the underlying transfer, the initial transfer is
12 avoidable and therefore that we are capable of avoiding it and
13 it will, therefore, be avoided. That is we have asked for in
14 the complaint and I will confess it is not as artful as it
15 should be, but we have asked for in the complaint for two
16 elements of relief. Avoid the transfer and permit us to
17 recover against these subsequent transferees. The avoidance of
18 the transfer is a transfer specific, a transaction specific
19 type of approach and we have to look at that transaction and
20 say, was that transaction a fraudulent transfer? And unless we
21 can prove up all the elements that are set forth in 548 and it
22 doesn't matter --

23 THE COURT: This is a 12 (B) motion. You've made the
24 allegation. I accept it as something you'll be able to prove.

25 MR. STERN: Right.

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1 THE COURT: So is what you've alleged a legally
2 sufficient claim for relief? And if you haven't, well, you
3 could have. So that's really the test.

4 MR. STERN: Correct.

5 THE COURT: Judge Gonzalez took your complaint and
6 said assuming that you can prove everything and that you've
7 alleged everything that you could reasonably allege you are out
8 of court.

9 MR. STERN: Correct. Because we've got a missing
10 party.

11 THE COURT: It wasn't that you have a missing party.
12 It was that you didn't obtain a judgment of avoidance.

13 MR. STERN: And what we are saying is that we can
14 obtain that judgment of avoidance. We can avoid the transfers
15 and we were actually suing and naming those defendants as to
16 whom we are establishing that avoidance. We will avoid that
17 transfer. The notion that we are --

18 THE COURT: Who are the necessary parties to do that.

19 MR. STERN: The answer is the trustee has a series of
20 options.

21 THE COURT: What have you done in this complaint?

22 MR. STERN: What we have done is we have sued for the
23 sake of this appeal National Australia Bank and Caisse neither
24 of which was the initial transferee.

25 THE COURT: The initial transferee is special purpose

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1 entity of ENRON?

2 MR. STERN: That is correct, CLO Holding.

3 THE COURT: Was it marshaled with ENRON's assets in
4 the bankruptcy?

5 MR. STERN: Yes, it is.

6 THE COURT: It is really part of the bankruptcy
7 estate?

8 MR. STERN: It is. But --

9 THE COURT: So the separation between ENRON and the
10 special purpose entities in particular ones we have here have
11 been dissolved?

12 MR. STERN: That is correct, and --

13 THE COURT: They're considered one company?

14 MR. STERN: They are not considered one company. They
15 were not consolidated. So in that sense they are not.

16 THE COURT: That's because they're different
17 creditors?

18 MR. STERN: Different creditors and different assets.
19 They were not substantively consolidated and we don't make the
20 argument, your Honor --

21 THE COURT: For the purposes of creating a plan the
22 trustee was able to use the assets of both companies according
23 to some notion of equity and acceptability.

24 MR. STERN: There were hundreds of companies, yes, and
25 there was a methodology that was used within the plan.

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1 THE COURT: Your adversary is shaking his head
2 vigorously, no, but he'll get his chance.

3 MR. STERN: So I can make IT clear, the essence of our
4 case here is not -- again, I am snatching defeat from the jaws
5 of victory, I'm also being candid with your Honor. The essence
6 of our case is not that because CLO Holding was an affiliate of
7 ours that somehow that excuses us from suing them. It's really
8 much more basic than that.

9 THE COURT: How?

10 MR. STERN: Well, the essence of our claim is that one
11 does not have to sue the initial transferee in order to recover
12 against the subsequent transferee. That is our position. That
13 is what we've briefed.

14 THE COURT: That's true as a matter of fraudulent
15 conveyance law.

16 MR. STERN: That is correct. My assertion would be
17 that --

18 THE COURT: There's another part of this argument
19 dealing with the statute of limitations. Give us a word about
20 that.

21 MR. STERN: The statute of limitations again has
22 engendered a fair amount of confusion here and certainly
23 engendered confusion below. The bankruptcy code separates the
24 concept of avoidance and recovery and although the cases are
25 extremely sparse in which there is an action to first avoid and

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1 then recover there are a few of them. But, basically, the way
2 the statute of limitations works is as follows: If all you
3 want to do is avoid a transfer, then under that set of
4 circumstances you have got two years after the petition date to
5 sue or lose the claim. And if you all you want to do is avoid
6 the transfer, if you want to then recover subsequently, and,
7 again, the number of cases where that has happened is you could
8 probably count it on a handful because it just doesn't
9 happen --

10 THE COURT: Why doesn't it happen?

11 MR. STERN: Because, generally, if you are going to
12 avoid and recover you do it in a single case. You file one
13 lawsuit. You have one count to avoid and another count to
14 recover and you are out of there and you file it within two
15 years of petition date, that's how you resolve it. And,
16 frankly, in most cases the initial transfer gets named the
17 subsequent transfer gets named everybody gets named.

18 Again, you have cases where that doesn't happen where
19 the initial transferee no longer exists where it might be in
20 bankruptcy, where it was offshore there was a district court in
21 Connecticut where that happened.

22 Getting back to the statute of limitations, you've got
23 two years after filing the, after filing bankruptcy to sue to
24 avoid. And then after you get a judgment for avoidance you get
25 another year to recover.

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1 THE COURT: What section is that?

2 MR. STERN: The recovery section is 550 (F) and the
3 statute of limitations on avoidance is 546 and I can't remember
4 the Subsection 546 (A).

5 THE COURT: 550 (F) an actual proceeding under this
6 section may not be commenced after the earlier of one -- one
7 year after the avoidance of the transfer on account of which
8 recovery under this section is sought, or, two, the time in the
9 case is closed or dismissed. That's one year after avoidance.

10 MR. STERN: Right. One year after avoidance; that's
11 correct.

12 THE COURT: That's an actual avoidance.

13 MR. STERN: That is correct.

14 THE COURT: That is the way Judge Gonzales interpreted
15 it.

16 MR. STERN: Right. And what he was concerned about
17 was that he said if you never seek to avoid your statute never
18 runs. The answer we have to that is --

19 THE COURT: Till the case is closed.

20 MR. STERN: Right. Which you know that can take a
21 decade, but that's not our position. Our position is very
22 simple. We had to sue Caisse and NAB within two years. It's
23 as simple as that. Because as to them we wanted to both avoid
24 and recover. And if you are going to avoid, 546 (A) tells you
25 you've got two years. So, if you've only got two years to

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1 avoid and recover if you blow that statute that's it. It's
2 game over. You don't get to somehow use a back door approach
3 and say, well, I am never going to avoid the transfer. You
4 have to avoid the transfer.

5 THE COURT: I know. I don't know understand that.
6 You have two years to obtain a declaration of avoidance.

7 MR. STERN: That's correct.

8 THE COURT: And one more year to go after the ultimate
9 holder of the assets.

10 MR. STERN: Right.

11 THE COURT: So you don't have to do within two years.
12 You could have done it in -- the legal and if you sue you could
13 have sued that special entity within two years obtained a
14 judgment and then have another year to sue the third party.

15 MR. STERN: I don't read it that way, your Honor. I
16 don't think that's correct. I believe that you have to avoid
17 and recover against Caisse --

18 THE COURT: How do you read 550 (F) (1).

19 MR. STERN: I read 550 and (F) (1) and 546 together.
20 And what I say is the following: Actually, let me flip it on
21 its back a little bit. Let me look at it this way. If you
22 could sue the initial transferee within two years you
23 presumably could enter into various scheduling agreements and
24 things like that and you could go on endlessly. You could have
25 a judgment five years after the petition date.

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1 THE COURT: That happens.

2 MR. STERN: And it might be appealed and remanded. It
3 might be another couple years before you actually have a final
4 judgment. Now, you would turn around and you would sue Caisse
5 and NAB whose personnel have changed, whose records have
6 changed and perhaps in this electronic age nothing much
7 actually get's thrown away. You would be looking at a
8 situation in which you would be facing these defendant who
9 would now be suddenly confronted with a lawsuit five, six, ten
10 years after the transaction in question.

11 THE COURT: Let me understand that better. I am
12 looking at 546 (A) an action or proceeding including an action
13 under Section 540 (A) may not be commenced after the earlier --
14 says one later after -- two years after the order entry of
15 order for relief that the one --

16 MR. STERN: That's effectively the one we're talking
17 about.

18 THE COURT: What is the order for relief?

19 MR. STERN: The bankruptcy petition in the case of a
20 voluntary bankruptcy case if there is an involuntary then
21 there's a trial as to whether the case goes into bankruptcy and
22 the order for relief may be later. In a voluntary case for all
23 intents and purpose taking out the order of protection.

24 THE COURT: It is the order of protection?

25 MR. STERN: Yes.

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1 THE COURT: And you have two years after that to get
2 the judgment that you did under Section 546. And what is the
3 judgment that you get under 546?

4 MR. STERN: Actually, under 546 you actually don't get
5 a judgment -- that is a referenced in 546.

6 THE COURT: I see. So an action or proceeding under
7 Section 540 (A) must begin within two years after the order of
8 protection.

9 MR. STERN: Correct.

10 THE COURT: And under 548 the judgment that you get,
11 the relief that you get is a judgment of avoidance.

12 MR. STERN: Correct.

13 THE COURT: Effectively a declaratory type judgment
14 that a particular transaction is a fraudulent transfer and
15 therefore it's set aside. So your opponents argument that
16 Judge Gonzalez's analysis is following the plain meaning of
17 these three statutes that you have one year after you get some
18 kind of a judgment, a declaratory judgment that transaction is
19 avoided.

20 Now, your problem is that you company couldn't
21 effectively get that judgment because there was no CLO Holdings
22 and there was no CLO trustee. The special purpose entity which
23 amounted to the way that ENRON committed its frauds had been
24 collapsed.

25 MR. STERN: That's correct.

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1 THE COURT: Looking through your complaint that I find
2 very interesting is there are no allegations regarding that
3 particular set of events that is the collapse of ENRON and its
4 purpose, special purpose entities and the marshaling in some
5 fashion I don't really understand. And there is no allegation
6 of complicity on the part of the transferees. And it seems to
7 me that I think I am being a little adventurous here, but in
8 order to get around the obstacles that the joining of 546 and
9 548 and 550 create for you, you have to show some contextural
10 set of events that make it impossible to follow this statute.
11 You've not done that.

12 I would think there's a real purpose for this because
13 when assets have come to rest in some of third party it's a
14 different state of events in the immediate transferee as to
15 which the allegations of fraudulent conveyance or fraudulent
16 transfer have been made and the extra protection that is
17 obtained to benefit the mediate -- the mediate, not immediate
18 transferee is to first require you to get a judgment actually
19 voiding the transfer and that works very nicely. You can join
20 it together and modern pleading that's essentially what happens
21 under Rule 14, under Federal Rule of Procedures or you can it
22 do it separately and the bankruptcy law allows both, but your
23 problem is that you can't do it at all.

24 MR. STERN: Well, let's just sort of comment on a
25 couple points that your Honor just made. First of all,

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1 although this is styled a fraudulent transfer, there is no
2 claim of complicity, wrongdoing and the like.

3 THE COURT: I noticed that.

4 MR. STERN: That's because this is what's known as a
5 constructive fraudulent transfer as opposed to an actual
6 fraudulent transfer. That is not to say that ENRON wasn't a
7 major fraud, clearly, it wasn't.

8 Although ENRON was a major fraud the allegations here
9 are of constructive fraudulent transfer. Sometimes they could
10 be called technical fraudulent transfers, and it's one of those
11 things there is no actual intent element to this. What it is
12 an insolvent entity that's made a transfer for less than their
13 consideration. That's really all that's going on here.

14 THE COURT: You can't assert its defense that it's a
15 holder in good course.

16 MR. STERN: There is a good faith element which is
17 part of the defense, not part of the complaint which a party
18 like National Australia's case can absolutely try to assert.

19 THE COURT: That is the rule. Generally seeking a --
20 your problem is that you are -- you have obstacles that Judge
21 Gonzalez laid in. He took a very difficult subject and made it
22 understandable and I think he is correct in his analysis. I
23 don't know that it's necessarily dispositive on a 12 (B)
24 motion. But it will take a better pleading to get around the
25 statutory framework as annunciated by the decision.

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1 MR. STERN: Let me try to respond to that.

2 THE COURT: I can't criticize Judge Gonzalez. I think
3 he has done a very fine job.

4 MR. STERN: I wouldn't be criticizing Judge Gonzalez
5 either. I think he does a terrific job, but I think he got
6 this one wrong and I just want to elucidate again why I think
7 that's the case.

8 THE COURT: I followed you on it. They're not easy.
9 The whole set up is not easy. Go ahead.

10 MR. STERN: Let me just explain why I think that
11 particular analysis doesn't hold and I think that we keep
12 falling on the notion that the initial transferee is a
13 necessary party to this whole process and I've run into the
14 plain language of 550 which basically gives me a choice. And
15 if you look at 548 throughout, and you won't find any mention
16 in 548 and as to who you have to sue. 548 describes the
17 transaction much like the Uniform Fraudulent Conveyance act
18 does and the Uniform Fraudulent Transfer Act, it tells you
19 about a transactions what obligations, what property transfers
20 are fraudulent as a matter of law, whether they be actual fraud
21 or constructive fraud which we've just discussed. And those,
22 if you look at 548 (A) you do not find within 548 (A) any
23 reference to a command that you sue the initial transferee.

24 THE COURT: There's nothing about --

25 MR. STERN: That's correct. The initial transferee --

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1 THE COURT: The focus is on the transaction that is an
2 avoidable transfer.

3 MR. STERN: Correct. And what we are saying is that
4 you read 548 (A) and it is transaction specific 548 and other
5 sections --

6 THE COURT: It gives the trustee discretion the
7 trustee may avoid.

8 MR. STERN: He doesn't have to. He can make a cost
9 benefit analysis as whether or not a particular transaction
10 should or shouldn't be avoided more.

11 THE COURT: So once these transactions are voidable
12 and that sets up the language of 550 that you need to have this
13 avoided.

14 MR. STERN: Correct. And where we and Judge Gonzalez
15 parted way and it may well be where your Honor and I parted way
16 is that the notion is why do you have to sue the initial
17 transferee? One can look at this kind of situation and one
18 has, there are a series of courts --

19 THE COURT: That's the only way I know to avoid the
20 transaction.

21 MR. STERN: Well, it's really no different from
22 finding, for example, that a particular entity who is not
23 around any more is negligent and you've got a successor to that
24 entity and you now are trying to impose successor or liability
25 on them.

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1 THE COURT: What you are arguing is I think that in
2 the judgment that you arguably obtained against the two banks
3 that hold the assets, you will get a declaration that the
4 guarantee and the execution of that put made by ENRON was a
5 transaction that should have been and now is avoided.

6 MR. STERN: That is what we would hope to get.

7 THE COURT: And your argument is that you don't need
8 CLO and the other special purpose entity to accomplish that.

9 MR. STERN: That's exactly right. And just to sort of
10 kind of put the final touch on it, the question arises, let's
11 assume that CLO were a party. Let's assume that a defunct
12 enemy is a party. Let's assume that an offshore entity is a
13 party. What does it add to the protections provided to the
14 subsequent transferee? This is sort of a function as opposed
15 to a protectoral analysis, but I think it comes out the same
16 way. Fundamentally, there are a series of cases to talk about
17 why one goes after the deep pocket. It's no surprise. And the
18 answer is a CLO Holding being in a case is of no utility. It
19 has no assets, no ability to respond. One even wonders how
20 exactly other than reporting some guardian ad litem for
21 litigation --

22 THE COURT: It would need to have permission from the
23 same court that deals with ENRON.

24 MR. STERN: Basically, we actually, obviously, since
25 we were controlled the CL Holding we are not going to put on a

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1 very vigorous defense. The person only person who is going to
2 put on a vigorous defense is the party who is going to
3 ultimately have to pay the tab. In this case it's National
4 Australia Bank, they are here. They can assert each and every
5 defense to avoidability that they wish to assert and we get to
6 avoid it as to them and to recover as to them.

7 Now, I think you know the essence of our case is --

8 THE COURT: So your argument is that before there is a
9 recovery against the two banks there will be a declaration, a
10 moment in time before that the transaction underlying that is
11 avoided?

12 MR. STERN: Correct. And that step we cannot skip
13 over.

14 THE COURT: Any brilliant comment that will add to
15 that.

16 MR. STERN: I think you've summarized it exactly, your
17 Honor. I have nothing further.

18 THE COURT: So, we will hear Mr. Shimshak.

19 MR. STERN: Thank you.

20 THE COURT: Mr. Shimshak, don't shake your head.

21 MR. SHIMSHAK: Sorry, your Honor.

22 May I start on that point?

23 THE COURT: Not shaking your head.

24 MR. SHIMSHAK: Not shaking my head but clearing things
25 up about CL Holding. There is remarkably little said about CL

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1 Holdings in the complaint as you've already acknowledged. But
2 the facts about CL Holdings are known and I don't think
3 Mr. Stern is going to have any objection to what I tell you
4 about CL Holdings.

5 Number one, CL Holdings was not in bankruptcy. It was
6 a non bankrupt subsidiary of ENRON.

7 Second, at the time that this claim was filed that is
8 within that two year period that Mr. Stern was discussing
9 earlier CL Holdings was in existence. ENRON functioned as in
10 its general partner. The limited partner was a trust that
11 issued note to my clients and others. So CL Holding was in
12 existence. It was not defunct. It was perfectly amenable to
13 suit.

14 Second, CL Holdings was subsequently dissolved after
15 the lawsuit was begun. And the inference that is made in the
16 briefs through the dissolution is that it was not amenable to
17 suit any more. That is not an accurate statement of the law.
18 A dissolved partnership under Delaware law, a partnership in
19 dissolution can still be sued.

20 THE COURT: Like New York law.

21 MR. SHIMSHAK: Correct. So the initial transferee
22 existed at the time the lawsuit was filed. It was dissolved
23 after the statutory deadline in the lawsuit was in place, but,
24 nonetheless, even if it had been dissolved at the time the
25 lawsuit was filed it was still amenable to suit. So I want to

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1 clear up the statute --

2 THE COURT: I'm not sure you completely cleared it up.
3 Give me the practicality.

4 MR. SHIMSHAK: The practicality of it is is that there
5 was an initial transferee in existence and any suggestion that
6 there wasn't an initial transferee in existence, and,
7 therefore, because there was an initial transferee there should
8 be some elasticity applied to the law here doesn't hold up.

9 THE COURT: After the put was there anything left to
10 CL Holdings?

11 MR. SHIMSHAK: Your Honor, I honestly don't know as a
12 factual matter whether the put involved the entirety assets --

13 THE COURT: Was there a functioning business after the
14 put?

15 MR. SHIMSHAK: It certainly continued in existence and
16 to the extent it had other assets that would have been holding
17 those other assets.

18 THE COURT: Do you know what this means since you've
19 paid the tax interest that year?

20 MR. SHIMSHAK: This is a special purpose vehicle. It
21 was not something that had a purpose as I don't know the
22 structure of the transaction. Now, whether or not it had other
23 rights, other remedies that were available it as a functioning
24 partnership is something that is not in the pleadings.

25 THE COURT: Let's assume as I think I should for the

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1 purposes of that analysis, that there was nothing more to the
2 special purpose. Isn't that whatever purpose it had in life it
3 had served -- but it had served and that was its end. It had
4 no more rationale for being and it was quickly allowed to died
5 either an a artificial or an actual death, what is to be
6 gained?

7 MR. SHIMSHAK: That goes to the essence of what we're
8 talking about in the substance of these claims, so I am glad
9 you asked that question. I want to start with Section 550
10 because in his argument Mr. Stern repeatedly said Section 550
11 identifies the parties, gives me an option as to who the
12 parties are that I can both avoid and recover.
13 You heard him say that. It gives me the option --

14 THE COURT: He said he is collapsing 548 and 550.

15 MR. SHIMSHAK: Let me read to you from the legislative
16 history which is cited in Mr. Stern's memorandum of law at page
17 13 on Section 550 (A) which could not be clearer. Section 550
18 (A) unambiguously announces the separation between two
19 distinct remedies, that of avoiding versus that of recovering a
20 transfer. And when you look at the text of Section 550 (A),
21 Section 550 (A) does not say who you can avoid. It says, to
22 the be extent that a transfer is avoided the trustee may
23 recover. 550 (A) is giving you an option not as to against
24 whom you can avoid, but against whom you can recover. And that
25 was what Judge Gonzalez confronted when he looked at this case.

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1 THE COURT: I think Mr. Stern is looking less to --
2 well, he is reading Mr. Judge Gonzalez the -- he wrote. I
3 think you are reading him for more than he wrote.

4 MR. SHIMSHAK: I'll tell you what Judge Gonzalez said
5 on Section 5 --

6 THE COURT: I know what he said. The point is it's my
7 job to do this.

8 MR. SHIMSHAK: Of course.

9 THE COURT: I'm trying to parse this statute in a way
10 that is contextually meaningful, and if you take the argument
11 and accept it as true, I think you should, there is no function
12 left for CLO Holdings. What is needed is a declaration of
13 avoided which can be made in the same lawsuit as this lawsuit
14 against the two banks.

15 MR. SHIMSHAK: Let me tell you what the difficulty is
16 with that. You are focusing on the exceptional case, a case
17 where you've got a defunct entity for the sake of the
18 hypothetical that you are holding like CLO Holding and you are
19 announcing a general rule which will be applicable in every
20 fraudulent case.

21 THE COURT: I don't want to do that because I think
22 there's purpose in the separation in the normal context where
23 you have live companies on all three ends or at least in two
24 and three a trustee and two live conditions. There is a
25 purpose to be served in obtaining a declaration of avoidance

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1 before you go after the party that is potentially a holder in
2 due course or a good faith purchaser for value. And that is
3 the function that I detected in 548 and 550 served.

4 MR. STERN: Your Honor, there is an irony in this
5 because the party that should be making this argument is not
6 the trustee who is bringing the suit. Talking about the
7 ineffectuality of suing the initial transferee in begging for
8 the opportunity in that circumstance to raise all of the
9 defenses that are available to the initial transferee. The
10 irony here is that ENRON made a decision on its own to avoid
11 suing the initial transferee because it decided on its own that
12 it would be futile to sue --

13 THE COURT: And indeed there play be context waiver
14 and estoppel that prevents from doing so because it's hard to
15 charge and impute a knowledge to the special purpose entity in
16 dealing with ENRON that ENRON fully had. Indeed, that's why it
17 set up the special purpose entity to perpetrate a fraud.

18 MR. SHIMSHAK: Let's talk about the practicalities of
19 this as well. I think in this situation and as a general
20 situation, the kind of things that gave Judge Gonzalez pause
21 when he looked at the notion that you could avoid a fraudulent
22 transfer against a subsequent transferee. First he said who
23 has the knowledge of the defenses? Who is going to have the
24 knowledge of the defenses under that circumstance? It stands
25 to reason that the parties who were the participants in the

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1 transaction, the transferor and the transferee are going to
2 know the issues of reasonable value and the like.

3 THE COURT: That's a normal context but not this one.

4 MR. SHIMSHAK: I'm not prepared to concede or abandon
5 the notion because we're talking about this hypothetically that
6 it was futile to have sued the CL Holding.

7 THE COURT: Maybe the remedy, why should we fully
8 assume?

9 MR. SHIMSHAK: It's speculation by ENRON.

10 THE COURT: So one way out of this in looking at a 12
11 (B) motion as properly made if there's no way to state a theory
12 only, no way to amend a theory, maybe we should require
13 Mr. Stern to amend his pleading, to state the kind of situation
14 in relationship to the lack of viability in the special purpose
15 entities that would justify collapsing 548 and 550.

16 MR. SHIMSHAK: I certainly don't think that is the
17 solution here. Let me give you some observations why.

18 THE COURT: I don't think it is your purpose because I
19 think you can't prove that.

20 MR. SHIMSHAK: Number one, and would make the
21 observation that ENRON which was serving as the general partner
22 of CLO Holdings owed a fiduciary duty to the limited partner.
23 So it is not an inescapable conclusion.

24 THE COURT: Who is the limited partner?

25 MR. SHIMSHAK: The limited partner was the trust which

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1 helped the limited partnership interest.

2 THE COURT: Who was the trust?

3 MR. SHIMSHAK: The trust is the special purpose
4 vehicle itself created to issue notes to clients like mine.

5 That money then went in to purchase their limited partnership
6 interest in the limited partnership.

7 THE COURT: Trusts like these were the subject of
8 criminal proceeding?

9 MR. SHIMSHAK: No, not at all, your Honor. There's no
10 allegation to that effect.

11 THE COURT: Maybe not this one.

12 MR. SHIMSHAK: No. No. That has -- what ever ENRON's
13 history is, and I think I agree with Mr. Stern on this
14 concerning the fraudulent conduct, this transaction and parties
15 to this transaction had nothing to do with anything of that
16 sort. I would say from the ENRON top of the transaction down
17 to the no holders.

18 But I want to return to focus --

19 THE COURT: That's an important point. And something
20 I was looking for in the complaint when I approached this
21 complaint I asked myself, why is it that we have no context in
22 Judge Gonzalez's opinion, no commercial context in judge
23 Gonzalez's opinion, and, indeed, not in the complaint as well?
24 What is really happening here? And I asked myself, don't I
25 have to understand the commercial setting in order to rule

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1 intelligently on the law? That is the way I've trained and
2 that is the way I approach all these cases. They are
3 commercial cases.

4 So what appears to me what happened is a circularity
5 of this transaction. One would think that ENRON was creating
6 this special purpose entity, both these special purpose
7 entities as a way of taking assets on its books that were
8 probably subject to substantial discounts liquidating them into
9 cash, giving them guarantee to allow that to happen, providing
10 some kind of other discount or favorable consideration to the
11 banks that came up to the window to take these items of paper
12 and inducing the bank to do this by the guarantee enabled the
13 banks to put all of this back into ENRON a year or two later.
14 So accomplishing nothing economically but accomplishing a great
15 deal from economic point of view in puffing the books of ENRON.

16 MR. SHIMSHAK: I don't know the accounting treatment
17 but I can give you the economic rationale for the transaction.
18 The economic rationale is that you have got a clear series of
19 obligations that are throwing off income.

20 THE COURT: Right.

21 MR. SHIMSHAK: Let's just, for simplest terms this
22 is -- let's assume ENRON's got a bunch of due tos, people are
23 supposed to be paying ENRON money periodically. ENRON decides
24 to monetize that income stream. You can determine what that
25 income stream is worth. You put that income stream into a

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1 special purpose vehicle and parties then, a trust issues notes.
2 The notes are in effect used by the trust to acquire the
3 limited partnership there, which relates to the value of the
4 assets.

5 THE COURT: Explain the purpose of the guarantee.

6 MR. SHIMSHAK: The money then goes out to ENRON and so
7 ENRON has managed to monetize its obligation.

8 THE COURT: Which in olden days you would do by going
9 to the discount window of the bank and having the bank discount
10 you.

11 MR. SHIMSHAK: Undoubtedly, there was some analysis
12 about what these assets were worth and that was the determined
13 by price that was ultimately paid by the note holders when they
14 brought the notes that were issued by the trust and the
15 proceeds bought back in --

16 THE COURT: Then we know along the way without, it
17 seems, in authorizing guarantee agreement a put in the form of
18 a guarantee is created.

19 MR. SHIMSHAK: The allegation is that in response -- I
20 can't remember the precise allegation, but that there was
21 credit support provided to the limited partnership through the
22 form of a put obligation. So the partnership basically
23 acquired the right to put the assets that it was holding back
24 to ENRON in exchange for a payment.

25 THE COURT: ENRON by this set of transactions converts

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1 a long term set of assets converts a long term liability into
2 short term assets and short term liabilities. Because of this
3 guarantee by there was there was no legal obligation to do.

4 MR. SHIMSHAK: ENRON got consideration in exchange for
5 that guarantee. It got in exchange for agreeing to acquire the
6 assets it got the assets back.

7 THE COURT: Now, let's take this in a form of a set of
8 allegations that one makes a complaint, all of which are taken
9 as true and because a motion to dismiss under Section 12 (B),
10 Rule 12 (B) was granted, there is no opportunity ever to get
11 the merits of this situation. I think contextually a Court
12 should not dispose of this very serious set of issues, serious
13 in terms of allegation and serious in terms of understanding on
14 a motion.

15 MR. SHIMSHAK: You have got to go back to what
16 happened on the complaint. The allegation of the complaint on
17 the face of the complaint and you'll see that when you read it.

18 THE COURT: I have read it.

19 MR. SHIMSHAK: The allegation of the complaint was
20 that the put payment transfers were avoidable.

21 THE COURT: Mr. Stern has drafted a complaint that
22 imposes minimal obligations --

23 MR. SHIMSHAK: I understand that.

24 THE COURT: -- the proof that the tenor of my remarks
25 is that this complaint has to be amended in such a fashion as

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1 to -- large scale obligations on his part. In other words to
2 show that this was a fraudulent transaction from the beginning,
3 and, indeed, that there was either complicity on the part of
4 the banks or a knowledge of such series of events that they
5 should have been aware of what was going on. Otherwise, they
6 are bad faith purchases of value.

7 Normally, you don't have to allege this, but in this
8 case I think you do because I agree with you, Mr. Shimshak,
9 that the normal which of interpreting these fact is the way
10 that Judge Gonzalez did it. But I don't think that you create
11 an interpretation of statutes like this in a way that
12 eliminates the possibility of recovery. This small exception,
13 there needs to be a possibility of recovery.

14 MR. SHIMSHAK: May I understand --

15 THE COURT: I have one more comment that the whole
16 substructure of bankruptcy is equity. It's grown out of
17 insolvency law. Insolvency law was a very strong and important
18 part of equity and the nature of these equitable proceedings is
19 not like an internal revenue code but actually like a
20 proceeding bill, an equity and statute material and the rule
21 must be viewed with that substructure in mind. I am an old
22 fashioned lawyer still remembering this so.

23 MR. SHIMSHAK: I agree with you and I want to make
24 sure that I understand the direction of the ruling. As I
25 understand what the Court is saying is that Mr. Stern should be

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1 allowed to amend the complaint in a fashion that is going to
2 take us out of constructive fraudulent transfer and in which he
3 is going to have to demonstrate that the structure was
4 fraudulent in its nature, embrace the exception and to proceed
5 against the transferee.

6 THE COURT: I think that might so, but the remedy that
7 I have is to reverse and remand for such further proceeding as
8 shall be consistent with my ruling. I would leave to Judge
9 Gonzalez to figure out what is passable and what is not. I
10 will not impose a straight jacket on him. I think I'm ready
11 to rule. Unless you say more I think you know where my drift
12 is, Mr. Shimshak.

13 MR. SHIMSHAK: I think I do but I'll await the ruling.

14 THE COURT: This is my ruling.

15 We're dealing with a very complicated financial
16 transaction, of course, set of financial transactions. A large
17 sum of assets in the form of note receivables on the books of
18 ENRON were pooled and transferred to a special purpose entity
19 created for that purpose, a limited partnership by the name of
20 CLO Holdings and there were some other parts to it too. But,
21 essentially, CLO Holdings there was the form of a limited
22 partnership and another special purpose entity CLO Trust became
23 the limited partner and ENRON became general partner. The
24 purpose of this vehicle was to in effect create a syndication
25 of, I'm not sure whether it's partnership interests or for

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1 interests in the pool of assets, but essentially it was to
2 raise money that would be passed back in a series of
3 simultaneous transactions back to ENRON. In context as
4 Mr. Shimshak calls it monetize a long term receivable.

5 So before ENRON had the ability to take into income
6 only the yearly flow of interests now it could affect a
7 discount on the entire set of assets, create the protection of
8 earnings, avoid discounts if the paper was shaky and otherwise
9 improve its balance sheets. In the course of approximately a
10 year, this took place in the end of 1999, but in the course of
11 a year or a bit more than a year the assets that were
12 transferred to the two banks, the names of which Mr. Stern --

13 MR. STERN: National Australia Bank and the other one
14 is French Canadian Caisse.

15 THE COURT: C-A-I-S-S-E.

16 MR. STERN: I can't pronounce the rest of it in
17 French.

18 THE COURT: These two banks and perhaps others became
19 financially insecure in relationship to the values of the
20 assets that had been transferred to it. And I take this from
21 not only the allegations of the complaint but background
22 information on ENRON in context of these proceedings and in
23 some fashion near term guarantee was obtained from ENRON in the
24 form of a put which enabled the special purpose entity to one
25 or both of them to call upon the general obligations of ENRON.

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1 In Caisse the paper that had been originally transferred became
2 overly infirmed. Whether this was the accord of the special
3 purpose entities alone or the context of the obligations it had
4 to the two banks and others or because of the infirmity of the
5 banks function and security of the banks, we don't know.

6 The effect of giving this put was to create a short
7 term obligation on the part of ENRON and one year later
8 initiate the main purposes of the transactions that occurred in
9 late 1999. All this is in the context.

10 In reviewing Judge Gonzalez's decision which creates a
11 clear analysis of the confluence of the limitations of Section
12 546 affordability Section 548 and the liability of transferee
13 in Section 550 and I could not improve on the clarity of this
14 language, judge Gonzalez held the complaint as legally
15 insufficient. He held that before one could recover against
16 the holder of assets that was not immediate but in the parlance
17 of the bankruptcy statute -- mediate, that is at least once
18 removed from privity -- there had to first be a voiding, an
19 actual voiding of the basic fraudulent conveyance. That is to
20 say, the transaction between ENRON and the special purpose
21 entities that were created by ENRON had to be subjected to a
22 declaration of avoidance. That is, they had to be avoided.
23 And this Judge Gonzalez held was a precondition to obtaining
24 recovery against the ultimate holder of the assets.

25 A lawsuit needed to allege the fact of having been

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1 avoided. Judge Gonzalez held as a prerequisite to a lawsuit to
2 gain recovery of the assets subsequently transferred after this
3 transaction that was avoided.

4 In my analysis, although I agree with Judge Gonzalez
5 that the rule he states is the better rule in connection with
6 the divide, the opinions that are presented as precedents and
7 the rule more consistent with the statutory framework, I think
8 it necessary to leave open the possibility of an exception
9 where for legal or practical reasons it is impossible or
10 impractical to satisfy the precondition of an avoidance.

11 Like any condition precedent two ready an application
12 of the requirement of the condition precedent can amount to a
13 forfeiture. And in this application it would bar the trustee
14 from seeking recovery of assets that arguably should be
15 recovered for the bankrupt to stay and the creditors thereof.

16 And so I believe that since we are involved with
17 statutory extensions of laws of equity and I think we should
18 inform the way that the bankruptcy code and rules are
19 interpreted not in the feasant of literal terms, but,
20 certainly, where there is sufficient ambiguity to allow such we
21 can satisfy both literal rule and equity by allowing this
22 condition precedent of avoidance to come into play in a lawsuit
23 where the only defendants are the holders of the assets that
24 were fraudulently conveyed in the first instance.

25 So, it would be required in this lawsuit for the

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1 trustee to amend and allege those conditions which would allow
2 such collapse of Section 548 and Section 550 of Title 11,
3 create a situation where the condition precedent of avoidance
4 can be part of the declaration that the Court is asked to
5 declare and that this could then be if even in the same
6 judgment the satisfaction of the condition precedent of Section
7 550 (A) (2).

8 Precisely what allegations are necessary to satisfy
9 this analysis I leave to judge Gonzalez in his wise
10 administration of the bankruptcy code. But the allegations
11 should be a legally sufficient justification for bypassing the
12 normal regimen of first a proceeding to avoid and therefore a
13 proceeding to recover from a subsequent transferee.

14 I think that will sufficiently explain my reasons for
15 reversal and I thank you for those interesting words.

16 MR. SHIMSHAK: May I ask one clarifying question, your
17 Honor?

18 THE COURT: Yes.

19 MR. SHIMSHAK: I think this is implicit in what you've
20 prescribed but in dealing with any amended complaint it must
21 necessarily be true that the conditions you are talking about
22 as to the initial transferee in this case CL Holdings were true
23 as of the time that the complaint was filed. In other words,
24 we can't --

25 THE COURT: I can't say that because there is a window

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1 time and I don't know how that would be -- I will not try to
2 clarify that.

3 MR. SHIMSHAK: Okay.

4 THE COURT: All right. We will have a summary order
5 that captures this and these proceedings are now closed and the
6 case, the appeal is concluded.

7 MR. STERN: Thank you very much, your Honor.

8 MR. SHIMSHAK: Thank you, your Honor.

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